UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 1-9 AFL-CIO, CLC,	)	
Plaintiff,	)	Civil No. 03-225-B-W
v.	)	
S.D. WARREN COMPANY d/b/a SAPPI FINE PAPER NORTH AMERICA (Somerset Plant),	)	
Defendant.	)	

RECOMMENDED DECISION REGARDING APPLICATION TO VACATE, MODIFY OR CORRECT ARBITRAL AWARD

The Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 1-9, AFL-CIO, CLC, ("the Union") has filed a motion to vacate a portion of an arbitral award rendered in connection with defendant S.D. Warren Company d/b/a Sappi Fine Paper's discharge of union member Tracy Hotham. Following a one-day hearing in July 2003, the arbitrator, Lawrence Holden, issued his award by letter dated September 8, 2003, in which he ruled that S.D. Warren violated the parties' collective bargaining agreement (CBA) by discharging Hotham without just cause, but declined to award reinstatement because he found that Hotham had engaged in certain post-discharge misconduct. The Union seeks vacatur of that portion of the award which denies reinstatement on the grounds (1) that consideration of post-discharge evidence was beyond the scope of the issue submitted for arbitration; (2) that the Union was not afforded an opportunity to present evidence and argument regarding the alleged post-discharge

misconduct; and (3) that the award was procured by S.D. Warren through fraud. Now pending are S.D. Warren's motion to summarily deny or dismiss the Union's application on the basis of a procedural misstep or for failure to state a claim (Docket No. 7), the Union's motion for partial judgment on the pleadings (Docket No. 13) and the Union's motion for partial summary judgment (Docket No. 14). Ultimately, it is my recommendation that the Court remand for further arbitration on the limited issue of whether reinstatement should be awarded.

Background Facts

Effective August 13, 2002, S.D. Warren d/b/a Sappi Fine Paper discharged Tracy Hotham, a machine operator who had been in the company's employ for some 13 years, for operating a powered industrial truck (PIT) in an unsafe manner on July 15, 2002. Hotham had operated a PIT in an unsafe manner on two prior occasions as well, on December 6, 2000, and on January 15, 2002. The January incident requires some comment because it was reported to management by one of Hotham's fellow bargaining unit employees. In effect at the time was a memorandum of agreement that encouraged the reporting of unsafe practices or incidents by bargaining unit employees. It provided, in relevant part, that "no employee would be disciplined as a direct outcome of incident reporting or investigation." On July 15, 2002, the day that lead to his discharge from employment, Hotham was observed bumping his PIT into roll heads and was orally warned to pay better attention to his work. Later the same day, a member of management observed as Hotham operated his PIT in a manner that caused its rear wheels to lift off the ground and slam down again. Immediately thereafter, management informed Hotham that his PIT license would be pulled and that he would likely be discharged. Hotham left work that day on account of a stress reaction and soon after applied for long-term disability benefits. Four weeks later, on August 13, 2002, S.D. Warren discharged Hotham. At some point in time not

disclosed in the arbitrator's order, Hotham applied for disability benefits, indicating July 15, 2002, as the commencement date of his alleged disability. Hotham began receiving disability benefits effective January 14, 2003, to continue for 24 months. Meanwhile, the Union supported Hotham in a grievance concerning his discharge and the matter was ultimately referred to arbitration at the Union's election. (See September 5, 2003, Arbitration Award, Docket No. 1, Part 5, pp. 1-3.)

Addressing the merits of the grievance, the arbitrator concluded that discharge was not appropriate because S.D. Warren should not have counted the January 15 incident against Hotham. According to the arbitrator, no adverse consequence was supposed to befall Hotham for an incident that became known to management only as a consequence of a report by a bargaining unit employee. Discounting this incident, the arbitrator reasoned that Hotham should have received only a written warning as a consequence of the July 15 incident because his record at that time had, in effect, only one prior oral warning. (Id., p.7.) Accordingly, the arbitrator found that Hotham's discharge was not for just cause and ordered that Hotham's discharge be converted into a written warning. (Id. at 7-8.) But the arbitrator did not stop there. Rather, he went on to consider whether the evidence, including the alleged post-discharge misconduct (receiving disability benefits while able to work), justified reinstatement. According to the arbitrator, reinstatement was not justified in light of post-discharge misconduct.

> Post-discharge evidence was submitted which is of substantial concern. It is accepted arbitral practice to receive post-discharge evidence which bears on the question of remedy. . . . . Of most serious concern was the post-discharge evidence wherein the grievant admitted in a workmen's compensation proceeding that he was capable of working at his regular job in the Finishing/Shipping Department during the time he was receiving long-term disability (LTD) benefits from the Company. (Co. Exh. #27, p. 121). This acknowledgement raises serious concerns about his conduct toward the Company. In addition, the grievant's attitude toward the Company and his job is further revealed by his inquiry in the Spring of 2002 as to whether the Company was interested in buying out his

> employment. This inquiry was not made in a context where the Company was offering employment buy-outs. Given this conduct and attitude on the grievant's part, I find that he is not entitled to reinstatement.

(Id. at 8.)[1] The Union timely moved to vacate this portion of the award. The Union commenced this litigation with a pleading captioned "Application to Vacate and Application to Modify or Correct Award," which it filed in Somerset County Superior Court and which S.D. Warren removed to this Court. (Docket No. 1 (notice of removal and exhibits).) The particular facts on which the application rely all concern the manner in which the issue of post-discharge misconduct was introduced during the arbitration process. The arbitrator's award is silent on when these contentions were first raised by S.D. Warren. However, a review of the Union's post-hearing brief (Docket No. 7, Ex. 1) reveals that the Union made absolutely no mention of these contentions or the evidence on which they were based. Based on its silence on this score, it would be surprising to find that the issue had been openly aired during the arbitration hearing. For its part, S.D. Warren admitted in its responsive pleading that it had never made any mention prior to the hearing that Hotham's post-discharge misconduct should serve as a justification for denying reinstatement, although S.D. Warren also denies that the issue was first raised in its post-hearing brief.[2] (Docket No. 2, ¶ 25.) However, in its initial memorandum in support of its motion to deny or dismiss, S.D. Warren uses language that indicates that, as of the close of the arbitration hearing, the post-discharge misconduct issue was nothing more than a "potential argument" not yet disclosed and that the most the Union would have known, at that time, was that "Company Exhibit #27 [an entire transcript] had been admitted . . . on the issue of remedy." (Docket No. 7 at 12.) Together, these record sources raise a reasonable inference that the issue

[1] The arbitrator also considered whether Hotham was entitled to an award of back pay. He declined to make any such award.

[2] The record and the parties both suggest that Hotham's receipt of disability benefits was made an issue insofar as it might impact his claim for backpay.

of whether Hotham's post-discharge misconduct was a sufficient ground for denying Hotham reinstatement was introduced in a manner that effectively prevented the Union from having an opportunity to present evidence and argument on that issue.[3]

Discussion

The Union's application recites the following five "counts":

I. That the award was not based on the CBA;

II. That the arbitrator imposed his own brand of industrial justice;

III. That the award was procured through fraud and deceit;

IV. That the award was procured through "negligent misrepresentation"; and

V. That the issue of remedy was beyond the parties' submissions to the arbitrator.

(Docket No. 1, Ex. 2.) Both the federal and state arbitration acts indicate that an arbitration award may be set aside where the award was procured through fraud, 9 U.S.C. § 10(a)(1); 14 M.R.S.A. § 5938(1)(A), or where the arbitrator exceeded his or her powers, 9 U.S.C. § 10(a)(3); 14 M.R.S.A. § 5938(1)(C). Both acts also permit a court to modify or correct an award where the arbitrator issued an award on a matter not submitted for arbitration, 9 U.S.C. § 11(b); 14 M.R.S.A. § 5939(1)(B).[4] The fraud ground is raised by the Union in Count III. The "arbitrator

[3] I have not relied on the Affidavit of William Carver submitted in support of the Union's summary judgment motion because I foreclosed briefing on that motion, which S.D. Warren may have reasonably interpreted as obviating any need on its part to submit countervailing testimony. Moreover, I am not inclined to think that in a proceeding of this nature the Court could realistically resolve a swearing dispute between the parties' representatives at the arbitration hearing. According to the allegations set forth in the Union's application, S.D. Warren introduced the entire transcript of Hotham's workers' compensation testimony at the close of its presentation, without flagging the relevant passage on which it would base its as yet to be made allegation of post-hearing misconduct. In contrast, when other portions of the transcript were discussed by S.D. Warren's witnesses in connection with other issues, S.D. Warren provided both the arbitrator and the Union with an excerpted copy of the relevant portion of the transcript. According to the Union, the arbitrator admitted the transcript in its entirety, over the Union's objection, based on S.D. Warren's representation that the transcript went to the issue of remedy. Also according to the Union, S.D. Warren subsequently pointed in its post-hearing brief to a passage of the transcript, not mentioned at the hearing, in which Hotham testified that he had received disability benefits at a time when he was capable of working at his PIT operator job. (Application, ¶¶ 17-34.)

[4] The Maine Arbitration Act provides, in relevant part:

exceeded power" ground is raised twice by the Union, both in Count I (award not based on CBA) and in Count II (award amounted to arbitrator's "own brand of industrial justice").[5] The Union also contends, in Count V, that the award should be corrected because the issue of remedy was not submitted to the arbitrator. The only count that does not appear to be premised on the statutory language is Count IV, in which the Union asks that the award be vacated because it was procured by S.D. Warren by means of a "negligent misrepresentation." The Union's pleas for relief read as follows:

> WHEREFORE, Plaintiff respectfully requests that this Court vacate the Arbitrator's Award insofar as it denies Hotham any remedy beyond[:]
>
> > The discharge of Tracy Hotham was not for just cause. Mr. Hotham's discharge shall be converted into a written warning.
>
> PACE further requests that the Court order a rehearing of this matter under the authority granted to it by 14 M.R.S.A. § 5938(3).

(Docket No. 1, Part 3.) Essentially, the Union wants the Court to rule that the consideration of post-discharge misconduct was unlawful under the circumstances and to remand the matter for further arbitration.

The matter is now before the court on a trio of motions, not including the application itself. The first motion is S.D. Warren's motion to dismiss, in which S.D. Warren argues that the Union's application should be dismissed either for the Union's failure to appropriately support the

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> 1. VACATING AWARD. Upon application of a party, the court shall vacate an award where:
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> A. The award was procured by corruption, fraud or other undue means;
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> B. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> C. The arbitrators exceeded their powers[.]

14 M.R.S.A. § 5938.

[5] There does not appear to be any legal basis for distinguishing counts I and II as the Union has. They appear to state the same issue in different terms.

application or for the application's failure to state a claim. (Docket No. 7.) The second motion is the Union's motion for judgment on the pleadings with respect to counts I, II, and V. (Docket No. 13.) Attached to this motion are the parties' CBA and the arbitrator's award. (Id., Exs. A & B.) The final motion is the Union's motion for summary judgment on counts III and IV. (Docket No. 14.)[6] I address the issues raised by the motions in order.

A. Procedural default.

S.D. Warren contends that the Union's application to vacate is dead on the vine because the Union filed its application in the form of a pleading rather than a motion and without submitting all of the evidence and argument necessary to support it. (Def.'s Mot. to Deny, Docket No. 7, at 7-8.) In support of this argument, S.D. Warren cites one Seventh Circuit case, one Eleventh Circuit case and one case from the Southern District of New York, discussed below. (Id. at 8.)

Title 14 M.R.S.A. §§ 5927-5949 (Maine's Uniform Arbitration Act), provides in § 5942 that any application under the act "shall be made by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." This language appears to be borrowed from the Federal Arbitration Act, which provides, "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise expressly provided." 9 U.S.C. § 6. In addition, Rule 81 of the Federal Rules of Civil Procedure indicates that "[i]n proceedings under

[6] To understand how this case came to be postured as it has, see my Report of Telephone Conference of Counsel and Order dated March 3, 2004, (Docket No. 18) and my Report of Telephone Conference of Counsel and Order dated March 29, 2004, (Docket No. 22). In particular, the Court will observe that S.D. Warren has not filed a response to the Union's motion for summary judgment. I indicated to the parties during our March 29, 2004, telephone conference that further briefing on the summary judgment motion was precluded because it appeared to me that there was absolutely no legal or factual basis to support the "negligent misrepresentation" claim and no factual basis whatever to support the fraud claim. (Id.) I made this determination in connection with my pre-trial case management authority and my efforts to determine how the Union's application (which ideally should have been presented in the form of a motion) should best proceed to judgment.

Title 9, U.S.C., relating to arbitration, . . . [the Civil Rules] apply only to the extent that matters of procedure are not provided for in [Title 9]." Fed. R. Civ. P. 81(a)(3).

In Health Services Management Corporation v. Hughes, 975 F.2d 1253 (7th Cir. 1992), the Seventh Circuit Court of Appeals held that applications to vacate arbitral awards must be in the form of a motion, are not subject to Rule 16 (governing scheduling and case management), and that it "behooves the moving party, as a practical matter, [to] provide the Court with all matters that it desires the Court to consider in support of [its] Application to Vacate." Id. at 1258-59 & n.3.[7] However, the Court also observed, "it is clear that the Court must still adequately consider 'the record' . . . and any written submissions in the form of objections, affidavits, etc. by the parties." Id. at 1258-59. Furthermore, the Court went so far as "to render a more substantive review due to the complexity of the issues and the failure of both parties to address relevant case law and controlling rules in their briefing of the case before the District Court." Id. at 1259. Consistent with this approach, in Home Insurance Company v. RHA/Pennsylvania Nursing Homes, Inc., 127 F. Supp. 2d 482 (S.D. N.Y.), the Southern District of New York resolved a motion to vacate in the context of what appears to have been a full-blown petition to vacate and a cross-motion to dismiss. Id. at 483-84.

The First Circuit Court of Appeals does not appear to have addressed the issue, although the Hughes case is cited by our First Circuit Court of Appeals on the issue of evidentiary burdens. See JCI Communications, Inc. v. IBEW, Local 103, 324 F.3d 42, 51 (1st Cir. 2003).

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[7] See also O.R. Secs., Inc. v. Prof'l Planning Assocs., 857 F.2d 742 (11th Cir. 1988). In O.R. Securities, the Eleventh Circuit Court of Appeals observed:

> "It is well-established that the purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation. . . . . The policy of expedited judicial action expressed in section 6 of the Federal Arbitration Act, 9 U.S.C. § 6, would not be served by permitting parties who have lost in the arbitration process to file a new suit in federal court. The proper procedure . . . is for the party seeking to vacate an arbitration award to file a Motion to Vacate in the district court.") (internal quotation marks and citation omitted).

Id. at 745-46.

But contrary to Hughes, JCI appears to have been decided in a summary judgment context.[8] Id. at 44 ("JCI filed suit to vacate the arbitral award; Local 103 cross-claimed for confirmation and sought summary judgment."). In fact, all of the recent First Circuit opinions addressing applications to vacate arbitral awards appear to have been resolved in this context. See Poland Springs Corp. v. United Food and Commercial Workers Int'l Union, Local 1445, 314 F.3d 29, 29 (1st Cir. 2002); Teamsters Local Union No. 42 v. Supervalu, Inc., 212 F.3d 59, 65 (1st Cir. 2000). Of course, unlike Hughes and O.R. Securities, the First Circuit opinions all involved labor unions as parties, which arguably implicates 29 U.S.C. § 185 (addressing "[s]uits by and against labor organizations"), although it is not apparent why § 185 should override any aspect of 9 U.S.C. § 6.

In my view, Hughes and O.R. Securities should be followed, in the sense that there should not be full-blown litigation in the context of the Union's application to vacate the arbitral award. However, I am not persuaded by S.D. Warren's argument that the Union's failure to initially submit a memorandum of law and affidavits should result in a default. The Union's failure to present a "motion" rather than a "pleading" has not been prejudicial in any way to S.D. Warren. Moreover, the Union's application, although in the form of a complaint, does not really run afoul of Federal Rule 7, insofar as it is (1) made in writing, (2) states with particularity the grounds upon which it is made and (3) sets forth the relief sought. In conjunction with S.D. Warren's removal of the application from the state court, this Court received virtually the entire record for review, considering that the contested arbitral award has been filed, the arbitrator made comprehensive factual findings in his award, none of which are challenged by the Union, and no transcript was ever made of the arbitration. Thus, the only procedural misstep by the

[8] The trial court may have converted a motion to dismiss or for judgment on the pleadings into a summary judgment motion.

Union concerns Local Rule 7. That Rule requires a movant to incorporate a memorandum of law in his or her motion, including citations and supporting authorities, and to submit affidavits and other documents setting forth the evidentiary basis for the motion. Although a failure to comply with this requirement may well justify a summary denial in certain contexts, presently before the Court are the Union's motion for judgment on the pleadings with respect to "counts" I, II and V (concerning the arbitrator's alleged exercise of power beyond his authority) and its motion for summary judgment on "counts" III and IV (concerning the fraud and misrepresentation grounds). The Union's evidentiary submission in connection with its summary judgment motion (a solitary affidavit) and the memoranda submitted in connection with both motions might be viewed as curing the violation of Local Rule 7, although a violation nevertheless did occur given that these papers were not filed contemporaneously with the application.[9] Ultimately, my view is that this matter should not be summarily dismissed, but should proceed on the Union's motion for judgment on the pleadings so that the matter might be resolved on the merits rather than through default.[10] Accordingly, I recommend that the Court deny S.D. Warren's motion to deny or dismiss. (Docket No. 7.)

B. Substantive merits of counts I, II and V.

According to the Union, the arbitrator's consideration of whether reinstatement was appropriate was inappropriate because the parties never mutually announced their intention that

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[9] I also observe that by filing two motions instead of one, the Union has also violated, in spirit if not in substance, the 20-page limitation imposed by Local Rule 7. See D. Me. Loc. R. 7(e).

[10] An ancillary issue was raised by Sappi with regard to the availability of discovery process that I appear to have left unresolved, despite a previous indication that I would grant Sappi protection from discovery. (See Docket No. 18 at 4-5.) Sappi moved for protection from discovery on the ground that a motion to vacate an arbitral award is a summary proceeding and, therefore, should not be delayed by discovery. (Docket No. 8.) In response, the Union argues that numerous motions to vacate are decided through the summary judgment mechanism and therefore, "in the event that Defendant contests the Statements of Material Fact accompanying the Motion for Summary Judgment, or to the extent that the Defendant's denials in its response affect the ability of the Court to rule on the Motion for Judgment on the Pleadings, discovery may in fact be necessary." (Pl.'s Opp. to Def.'s Mot. for Protective Order, Docket No. 16, at 2.) The Union's argument is unconvincing and its failure to portray the discovery it would seek is dispositive of the matter. The Union has proffered nothing to suggest that anything more than the record before the arbitrator need be reviewed to resolve this dispute. Sappi's motion for protection (Docket No. 8) is **GRANTED**.

he do so. As the Union sees it, "Hotham's employment was terminated by the *Arbitrator*, without any advance notice or opportunity to be heard, and in a manner which precluded any resort to the dispute resolutions of the CBA." (Docket No. 13 at 3.) Thus, according to the Union, the arbitrator implemented his own brand of industrial justice that directly undermined the protections afforded workers by the grievance process set forth in the CBA. (Id. at 4.) The Union submitted the CBA in conjunction with its application. It can be found in paper form in the file. The Union points to several provisions in the CBA that it contends were undermined by the arbitrator's action:

(1) Section 6 of the CBA, "Management of Plant," provides that S.D. Warren has the right to "discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons."

(2) Section 45, "Grievance Procedure," provides for a grievance and arbitration process for the "settlement of any disputes or complaints arising under the [CBA]" and that "the Arbitrator shall have no power to render a decision which adds to, subtracts from, or modifies [the CBA]."

(3) Section 52, "Discipline," provides for union representation when an employee receives discipline and provides that the Union and S.D. Warren will cooperate in "interviews . . . to determine the facts and truth surrounding the incident and will work cooperatively to determine such."

(4) Section 53, "Mill Rules," does not contain any provision concerning representations made in connection with applications for disability benefits or workers' compensation benefits.

According to the Union, the arbitrator acted beyond the power conferred upon him by the CBA and instituted his own brand of industrial justice because the CBA never authorized and the parties never agreed that the arbitrator "could cause the discharge of the employee for reasons other than those proffered by the employer in the initial discharge of the employee, thereby eliminating recourse to the applicable provisions of the CBA." (Docket No. 13 at 5.)

S.D. Warren contends that the Union is naïve to suggest that the arbitrator's ruling had to fall within a narrow framework mapped out by the parties mutual expectation. (Docket No. 24 at 2.) As for the Union's narrower suggestion that denial of reinstatement based on post-discharge conduct was beyond the arbitrator's authority, S.D. Warren characterizes this suggestion as "preposterous." (Docket No. 7 at 9.) According to S.D. Warren, reinstatement was at the very heart of the dispute and the arbitrator obviously had the discretion to deny reinstatement, independent of his finding on just cause, just as he had the discretion to deny an award of back pay. (Id. at 3-4.) Thus, S.D. Warren argues, "This case is not about the remedy imposed . . . . This case is about [a remedy denied.] The evidence did not cause the arbitrator to conclude that Mr. Hotham was worthy of a remedy." (Id. at 5.) S.D. Warren does not make any reference to the provisions or protections of the CBA in its memoranda.

In reply, the Union argues that "[t]he question of denying Mr. Hotham reinstatement for conduct entirely unconnected with the events which gave rise to his discharge was never before the arbitrator," unlike the back pay issue. (Docket No. 25 at 2.) The Union further notes that the arbitrator was fully aware of that fact (Id. at 5), quoting the Arbitrator, "The parties do not agree upon the issues to be submitted for decision. In essence, this case presents the question of whether the Company violated the collective bargaining agreement when it terminated the employment of Tracy Hotham . . . ." (September 5, 2003, Arbitration Award, Docket No. 1, Part 5, p. 1 (defining the "Issues" for arbitration).) According to the Union, the arbitrator rightly found that S.D. Warren had violated the CBA, but wrongly imposed a de facto discharge nonetheless, based on matters that the Union was unable to present evidence or argument about.[11] (Docket No. 25 at 6-7.)

[11] The arbitration proceeding called upon the parties to submit post-hearing briefs, without any opportunity to respond.

I consider this case to present a very close question. Surely the arbitrator had the discretion to expunge the "just cause" basis for Hotham's discharge from his record without mechanically ordering his reinstatement. After all, the CBA does not require reinstatement upon a finding that just cause was lacking. See Advest, Inc. v. McCarthy, 914 F.2d 6, 10-11 (1st Cir. 1990) ("arbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases. That leeway is at its zenith when, as here, the arbitration clause imposes no limitations on choice of remedies.") (citation omitted); S. D. Warren Co. v. United Paperworkers' Int'l Union, Local 1069, 845 F.2d 3, 8 (1st Cir. 1988) ("[I]f the parties do not pre-negotiate remedies, the arbitrator can fashion them as part of his decisional discretion."). But did the arbitrator have the authority to base his denial of reinstatement on alleged conduct that did not occur until after the grievance was referred to the arbitrator, was not identified by the parties in conjunction with their request for arbitration, was not made a subject of the arbitration hearing, and, most importantly, where his factual finding on that issue would have to be made without any input from the Union? In my assessment, the arbitrator did not exceed his discretion or engage in misconduct by addressing the issue of reinstatement independently of the just cause issue, but did exceed his discretion by resolving that issue as he did.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of Am. V. Enter. Wheel & Car. Corp., 363 U.S. 593, 597 (1960). Among the ways in which an arbitrator may be unfaithful to the underlying collective bargaining agreement is by straying "beyond the submission," meaning those "areas marked out for his consideration." Id. at 598. By going beyond the grievance actually submitted for resolution, the arbitrator departs from the CBA, which deprives him or her of legitimate authority to bind the parties. United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 36-37 (1987). As for the merits of a grievance, the meaning to be given terms and provisions of a CBA, and the determination of proper remedies, it is clear that the Court must defer to the arbitrator's "honest judgment." Id. at 38. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id.

Among the matters entrusted to the arbitrator's discretion is procedure. Id. at 39. Thus, in Misco, the Supreme Court held that it was not inappropriate for the arbitrator to refuse to consider evidence of pre-discharge misconduct unknown to the employer at the time the employee was fired. Id. The Court observed that the parties had been free to impose evidentiary or procedural restraints on any arbitration in their collective bargaining, but had not done so:

> Here the arbitrator ruled that in determining whether [the employee] had violated Rule II.1, he should not consider evidence not relied on by the employer in ordering the discharge, particularly in a case like this where there was no notice to the employee or the Union prior to the hearing that the Company would attempt to rely on after-discovered evidence. This, in effect, was a construction of what the contract required when deciding discharge cases: an arbitrator was to look only at the evidence before the employer at the time of discharge. As the arbitrator noted, this approach was consistent with the practice followed by other arbitrators. And it was consistent with our observation in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964), that when the subject matter of a dispute is arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.

Id. at 39-40 (footnote omitted[12]). The Court prescribed a strict standard for challenges to arbitration awards based upon evidentiary and procedural matters, requiring a showing of bad faith or an error "so gross as to amount to affirmative misconduct." Id. at 40 & n.10. Thus, the gist of the holding in Misco is that an arbitrator's refusal to consider what amounted to clear evidence of the employee's pre-discharge misconduct was not gross error because the evidence at issue had not served as the basis for the employer's decision to discharge the employee.

The instant case presents something of an inverse situation to Misco: the arbitrator admitted and relied upon evidence of post-discharge misconduct to deny reinstatement, even though the misconduct at issue was not relied upon by the employer in making the discharge determination and even though the conduct did not arise until after the in-house grievance process had run its course and the arbitration process had begun. By doing so, did the arbitrator reach "beyond the submission" or did he merely make an evidentiary or procedural ruling with respect to the submission that was before him? I conclude that he did the latter.

Different arbitration provisions yield different results. In this case, the parties' CBA is silent of the issue of available remedies.[13] Furthermore, as S.D. Warren points out, the question of remedy was not only implicit in the submission, it was expressly called into question by the

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[12] The footnote is of interest. The Supreme Court appears to have taken notice of the fact that non-consideration of post-discharge evidence was a prevailing practice among arbitrators of the time:

> Labor arbitrators have stated that the correctness of a discharge "must stand or fall upon the reason given at the time of discharge," see, e. g., West Va. Pulp & Paper Co., 10 Lab. Arb. 117, 118 (1947), and arbitrators often, but not always, confine their considerations to the facts known to the employer at the time of the discharge. O. Fairweather, Practice and Procedure in Labor Arbitration 303-306 (2d ed. 1983); F. Elkouri & E. Elkouri, How Arbitration Works 634-635 (3d ed. 1973).

Misco, 484 U.S. at 40 n.8. I do not construe this as placing any restriction on the arbitrator in this matter.

[13] Mandatory remedies are sometimes provided in collective bargaining agreements. See, e.g., E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 60 (2000) (involving a CBA provision specifying "that, in arbitration, in order to discharge an employee, [the employer] must prove it has 'just cause.' Otherwise the arbitrator will order the employee reinstated"); United Steelworkers of Am. v. Enter. Wheel & Car. Corp., 363 U.S. 593, 594 (1960) (involving a CBA provision that provided, "Should it be determined by . . . an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost").

Union in its brief before the arbitrator. In it, the Union characterized the issue submitted to the arbitrator as follows: "Did the company have proper cause to discharge Tracy Hotham? If not, what shall be the remedy?" (Docket No. 7, Ex. 1.) Based on the absence of any mandate in the CBA requiring reinstatement when a discharge has been imposed without just cause, and based on the fact that the Union flagged the issue of remedy in its arbitration brief, I consider it unreasonable to suggest that the arbitrator went beyond the submission or imposed his own brand of industrial justice by treating the availability of the reinstatement remedy as not turning exclusively on the absence of just cause at the time of the discharge decision. In determining whether to impose a reinstatement order on S.D. Warren for Hotham's benefit, the arbitrator was free to consider post-discharge conduct as well.

In Association of Western Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc., the Ninth Circuit Court of Appeals reached a similar conclusion in an appeal from the dismissal of a labor union's motion to vacate. 221 F.3d 1085, 1087 (9th Cir. 2000). The employee in Rexam had a record of excessive absenteeism, among other problems, and was discharged on a day she was absent from work and had provided the company with conflicting reasons. Id. The union filed a grievance and the matter was referred for arbitration. Id. The arbitrator concluded that the employer had lacked just cause to discharge the employee, but nevertheless denied reinstatement based on a finding that the employee had been untruthful at the arbitration hearing and had lied on an application for unemployment benefits and that the employer-employee relationship had deteriorated to the point that the employee could no longer be trusted. Id. The district court affirmed the arbitrator's denial of reinstatement. Id. at 1088. On appeal, the circuit court observed that the issue of remedy was expressly referred to the arbitrator. Id. at 1089. Although the court held that the arbitrator would have ruled beyond the scope of the submission

had she considered evidence of post-discharge conduct on the "threshold" question of just cause, it affirmed the district court's conclusion that remedy presented a distinct issue and that consideration of evidence of post-discharge conduct was entirely appropriate in that regard. Id. at 1089-90.

A consistent conclusion was reached by the Second Circuit in Saint Mary Home, Inc. v. Service Employees International Union, District 1199, in which the circuit court reviewed the district court's denial of the employer's application to vacate an employee-favorable arbitration award. 116 F.3d 41, 42 (2d Cir. 1997). In Saint Mary Home, the employer discharged the employee after the employee was arrested for assault and charged with assault and possession of marijuana with intent to distribute. Id. at 42-43. The union filed a grievance, which eventually went to arbitration. Id. at 43. As in this case and Rexam, the subject CBA required that discharges be made for just cause, but did not specify the remedy for a breach of this provision. Id. Also as in this case and Rexam, the parties submitted to the arbitrator the just cause issue and the remedy issue as distinct questions. Id. While the arbitration proceeding was pending the state reduced the charges against the employee to simple possession and placed him in a rehabilitation program that, if completed successfully, would result in a dismissal and expungement of the charge from the employee's criminal record. Id. In support of a finding that discharge had not been for just cause, the arbitrator considered, among other things, the fact that the prosecutor had offered the employee the rehabilitation program. Id. The court rejected the employer's argument that consideration of this post-discharge evidence was beyond the submission, albeit in equivocal terms. Id. at 45 (expressing "doubt" that consideration of post-discharge evidence went beyond the submission). Significantly, Saint Mary Home reflects how the consideration of evidence of post-discharge conduct or events can serve the employee's

interest as much as the employer's. See also Mobil Oil Corp. v. Indep. Oil Workers Union, 679 F.2d 299, 303 (3d Cir. 1982) (rejecting employer's argument that arbitrator went beyond the submission by considering mitigating medical evidence obtained post-discharge and not known to the employer at the time of its discharge determination, even though the arbitrator considered such evidence specifically for purposes of determining the existence of cause rather than just remedy).

Here, the arbitrator's admission of post-discharge evidence (the entire transcript of Hotham's worker's compensation testimony) was well within his "wide latitude in conducting an arbitration hearing." Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 38 (1st Cir. 1985). The arbitrator in the instant proceeding did not go beyond the scope of the parties' submission by addressing the issue of whether a reinstatement remedy was warranted and did not violate the CBA by admitting post-discharge evidence on that issue. The cases reflect that consideration of evidence of post-discharge conduct for purposes of determining a remedy is not unlawful, particularly where the CBA does not specify the remedy. In making evidentiary and procedural rulings, the arbitrator enjoys broad discretion. If the Union subjectively believes the CBA ought to expressly preclude an arbitrator from considering post-discharge evidence, it may address that matter in the context of future collective bargaining. See Misco, 484 U.S. at 38 ("[I]t must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established.").

Having concluded that neither the admission of the entire transcript nor the independent consideration of remedy was erroneous, the question becomes whether the manner in which the arbitrator disposed of that issue amounted to "misbehavior by which the rights of any party have

been prejudiced." 9 U.S.C. § 10(a)(3). See also 14 M.R.S.A. § 5938(1)(D) (requiring a court to vacate an arbitration award where the arbitrator "so conducted the hearing . . . as to prejudice substantially the rights of a party"). The Union contends that the arbitrator's denial of reinstatement was fundamentally unfair because he relied on a factual finding on an issue that was not raised during the arbitration hearing by either party, but was surreptitiously inserted by S.D. Warren post-hearing, thus preventing the Union from having "an adequate opportunity to present its evidence and argument" on that issue. (Docket No. 25 at 2-3 (citing Hoteles Condado Beach, 763 F.2d at 39).)[14] According to the Union's application, it could have dispelled the appearance of fraud in Hotham's workers' compensation testimony had it been placed on notice that S.D. Warren would rely on the testimony concerning Hotham's receipt of disability benefits. (Id.) S.D. Warren says that the Union is being "naïve" and observes that it is an inherent risk of litigation "that an arbitrator, fact-finder, judge magistrate, or whomever, may well decide to do something that none of the parties anticipated or understood to be part of the case." (Docket No. 24 at 2.)

> Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings. . . . . Vacatur is appropriate only when the exclusion of relevant evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing.

Hoteles,763 F.2d at 40 (Internal quotation marks and citation omitted). See also Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) ("[E]xcept where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review. In making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal

[14] The Union fairly raised this issue in its motion for judgment. See Docket No. 13 at 16-17. I also consider this claim to be raised in count V of the Union's application, which complains that the arbitrator "decided upon a remedy which [S.D. Warren] had never raised before or at a time when [the Union] was unable [sic] to respond." (Application, ¶ 68.)

courts. However, . . . an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.") (internal quotation marks and citation omitted) (citing Hoteles Condado Beach, 763 F.2d at 39).

The record reflects that the arbitrator denied Hotham a reinstatement remedy, despite finding that Hotham had not been discharged for cause, based primarily on a finding that Hotham received disability benefits at a time when he was capable of working.[15] The contention that Hotham had procured disability benefits under false pretenses, however, was never raised by S.D. Warren during the arbitration hearing. As a consequence, the Union had no cause to anticipate that Hotham's receipt of disability benefits might somehow serve, in essence, as the reason to deny him any remedy for the improper discharge or, as the arbitrator characterized S.D. Warren's argument, as an alternative ground for his discharge.[16] Of course, the question of prejudice remains. In Hoteles Condado Beach the Court of Appeals affirmed a decision vacating an arbitral award because the arbitrator "effectively denied the [employer] an opportunity to present any evidence in the arbitration proceeding" by refusing to ascribe any weight to the only evidence the employer had of the employee's violation of company rules. 763 F.2d at 40 (emphasis added). Here, prejudice is also apparent. The arbitrator determined that Hotham would not be reinstated despite an unjust discharge because the arbitrator placed decisive weight on a factual finding concerning an issue first raised by S.D. Warren after the arbitration hearing, based on evidence not openly presented during the hearing, without affording the Union any opportunity to submit argument or evidence concerning it. Although I recognize that the testimony contained in the transcript was Hotham's own, the significance of his transcribed

[15] The arbitrator referred to this finding as being "of most serious concern" to him on the issue of whether reinstatement should be awarded. (Award at 8.)

[16] The arbitrator characterized S.D. Warren's position as follows: "[S]ays the Company, if the grievant were to be reinstated, his dishonesty and fraud post-discharge would result in his immediate termination for those offenses." (Award at 6.)

statements concerning disability benefits is certainly susceptible to different interpretations by an arbitrator. According to the Union, there are several questions that it might raise, if provided the opportunity, such as whether it is S.D. Warren's practice to discharge employees who receive disability benefits at times when they believed they might be capable of working, or whether S.D. Warren's medical department or Hotham's medical care provider had approved him to return to work, notwithstanding whether Hotham believed himself capable of returning to work. Beyond these evidentiary issues, certain arguments also come to mind. If Hotham's alleged disability was a stress reaction to the loss of his job, why would it necessarily be fraudulent of him to say that he was capable of returning to work? I conclude that the arbitrator's treatment of the post-discharge misconduct issue was unfairly prejudicial to the Union precisely because the Union was not afforded an opportunity to delve into these and other relevant questions.

In sum, although I do not consider the arbitrator's admission of the entire transcript of Hotham's workers' compensation hearing or his independent consideration of remedy to have approached the level of arbitral misconduct, my assessment is that the arbitrator's decision to deny Hotham reinstatement was fundamentally unfair under the procedural circumstances because the decision was premised on a factual finding on an issue not identified during the actual hearing and concerning which the Union was unable to present evidence or argument. Accordingly, I recommend that the Court grant the Union's motion for judgment on the pleadings. (Docket No. 13.)

C. Substantive merits of counts III and IV.

With its summary judgment motion, the Union seeks to generate a factual issue concerning the manner in which S.D. Warren introduced evidence of Hotham's alleged post-discharge misconduct. Specifically, the Union wants to generate as a genuine issue for trial that

S.D. Warren perpetrated a fraud on the arbitration process by arguing in its arbitration brief positions that were not raised during the arbitration hearing. I foreclosed that avenue in my prior scheduling order based on my assessment that the factual issue the Union was trying to generate was plainly not material to the issue of fraud and based, moreover, on the fact that the nature of the matter at hand precluded a trial on the merits.

"Fraud, as covered by 9 U.S.C. § 10(a), requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or willfully destroying evidence, and further requires that such evidence of fraud was unavailable to the arbitrator during the course of the proceeding." Indocomex Fibres PTE v. Cotton Co. Int'l, 916 F. Supp. 721, 728 (W.D. Tenn. 1996). See also, cf., Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147 (1968) (vacating arbitral award where close business relationship between arbiter and one party to the arbitration was never disclosed to other party). Maine law is consistent with this standard. In Maine, "[f]raud requires clear and convincing proof that an advantage has been gained . . . by an act of bad faith whereby the court has been made an instrument of injustice." Estate of Paine, 609 A.2d 1150, 1153 (1992) (addressing the Rule 60(b) fraud standard).[17]

The Union argues that counsel for S.D. Warren perpetrated a fraud upon the arbitration proceeding by failing to disclose either that S.D. Warren would contest reinstatement or that S.D. Warren would rely on Hotham's receipt of disability benefits in support of its position. (Docket No. 14). Although the Union cites Maine fraud cases and the Maine Bar Rules in support of its

[17] Unlike 9 U.S.C. § 10(a)(1) and 14 M.R.S.A. § 5938(1)(A), which speak in terms of corruption, fraud or other undue means, Rule 60(b)(3) of the Federal and Maine Rules of Civil Procedure use more liberal terminology, permitting a final judgment to be set aside upon a showing of fraud, misrepresentation or other misconduct. Although I have cited a Rule 60(b) case in support of the proper fraud standard, I am not reading Rule 60(b)(3) into the Maine Arbitration Act.

position, it has presented no authority supporting the proposition that surprise tactics in litigation amount to fraud.

Bad faith is not apparent in this case because the conduct at issue involved merely the introduction of evidence and the presentation of argument, both of which the arbitrator permitted. It is hard to understand how S.D. Warren's request that the arbitrator consider Hotham's own testimony and draw certain inferences from it could rise to the level of a misrepresentation of fact, let alone fraud. It is also hard to understand the Union's strained argument that S.D. Warren owed the Union a legal duty to forecast its arbitration strategy. Whether to admit evidence and whether to consider it when fashioning an award is inherently within the arbitrator's discretion. Reduced to its essence, the Union's argument is really that S.D. Warren engaged in a tactic of unfair surprise, for how can it be fraudulent of S.D. Warren to introduce evidence at an evidentiary hearing and make arguments in a brief? Although surprise tactics are certainly objectionable, they cannot reasonably be considered to rise to the level of fraud. The Union provides no authority to the contrary. Accordingly, I recommend that the Court deny the Union's motion for summary judgment. (Docket No. 14.)

D. Recommended disposition.

Should the Court accept my recommendation that the arbitrator's handling of the reinstatement issue was fundamentally unfair and prejudicial to the Union, it must still determine the appropriate disposition for the pending application. In the plea recitation of the application, the Union requests that the arbitration award be vacated to the extent it went beyond the just cause issue and that the remaining issues be remanded for rehearing pursuant to 14 M.R.S.A. § 5938(3). However, the award should not be vacated with respect to back pay issue, which the Union has conceded in the context of this appeal. On the remaining issue of whether

reinstatement should be awarded, Supreme Court precedent instructs that a court "must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement." Misco, 484 U.S. 29, 40 n.10. Rather, a court should either vacate the entire award or, where appropriate, remand the matter for further proceedings on clearly identified issues. Id. In this case, the arbitrator bifurcated the issue of just cause and remedy and the only challenge to his award concerns the manner in which he decided the issue of reinstatement. Accordingly, it would be appropriate for the Court to vacate the award in part and remand the reinstatement question for further arbitration. In this way it would be possible for the Union to be heard on Hotham's receipt of disability benefits and whether such post-discharge conduct should prevent his reinstatement, and yet preserve intact the arbitrator's discretion to award, or not, the remedy in question.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** the Union's application, in part, by **VACATING** that portion of the arbitration award that addresses the reinstatement remedy and **REMANDING** for further proceedings on that issue.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Dated June 4, 2004

PAPER ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION LOCAL 1-9 AFL-CIO CLC v. S D WARREN COMPANY
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to:
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 29:185 Labor/Mgt. Relations (Contracts)

Date Filed: 12/30/03
Jury Demand: None
Nature of Suit: 720 Labor: Labor/Mgt. Relations
Jurisdiction: Federal Question

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